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No. 86-

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

HARRISON J. GOLDIN, Comptroller of the
City of New York, and THE CITY OF NEW
YORK,

Petitioners,
-against-

JAMES BAKER, Secretary of the Treasury of
the United States,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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April 10, 1987

Supreme Court, U.S.
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QUESTION PRESENTED

Whether the United States Court of Appeals for the Second Circuit erred in determining that section 86 of the Internal Revenue Code (26 U.S.C. § 86) is not a federal tax which violates both the constitutional doctrine of intergovernmental tax immunity and the guarantee of New York City's sovereignty under the Tenth Amendment to the United States Constitution, where section 86 effectively taxes the interest which many social security recipients receive on municipal securities, impairs the City's ability to borrow money, and will thereby conceivably prevent the City from providing essential services and funding capital projects?



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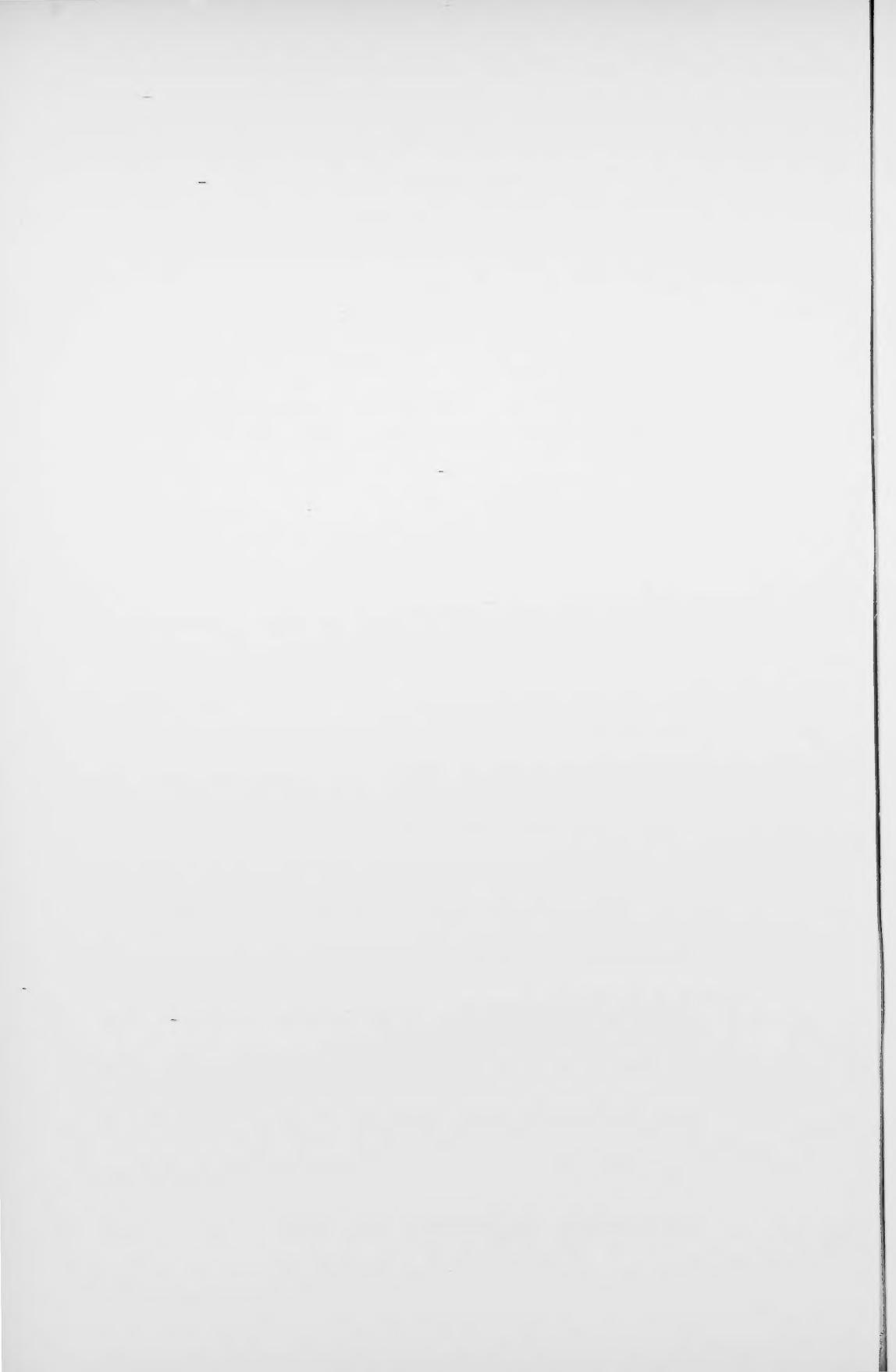
-against-

JAMES BAKER, Secretary of the Treasury of
the United States,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Petitioners the City of New York and
Harrison J. Goldin, in his capacity as the
City's Comptroller, respectfully request that
a Writ of Certiorari issue to review the
judgment of the United States Court of
Appeals for the Second Circuit entered in
this action on January 12, 1987. The Court



of Appeals affirmed the judgment of the United States District Court for the Southern District of New York (Broderick, J.), entered September 12, 1986, which denied petitioners' motion for summary judgment and dismissed the complaint challenging section 86 of the Internal Revenue Code (26 U.S.C. § 86) as violating the constitutional doctrine of intergovernmental tax immunity and the guarantee of the City's sovereignty under the Tenth Amendment to the United States Constitution.

The Court of Appeals agreed with the District Court that section 86 does not contravene the immunity doctrine because that statute is not, as petitioners assert, a tax on interest paid by the City on its securities, but, rather, only a tax on social security income. The Court of Appeals also concurred in the District Court's belief that, in any event, the immunity doctrine is



inapplicable because the adverse impact of section 86 on the City is not constitutionally impermissible. The District Court had reached that conclusion despite its acknowledgement that the statute's burden on the City could be "substantial". While the Court of Appeals found that section 86 imposed only an "indirect" burden on the City, the Court conceded that the statute could cause a decrease in the market for, and thereby force the City to pay higher rates on, its securities. Although the District Court did not explicitly address petitioners' Tenth Amendment claim, the Court of Appeals held that claim to be "totally unsupportable".

OPINION AND DECISION BELOW

The opinion of the United States Court of Appeals for the Second Circuit affirming the District Court's determination that section 86 is not unconstitutional, is



reported at 809 F2d 187, and is reprinted in the Appendix to this petition at pages 1-17. The decision of the United States District Court for the Southern District of New York, which is not officially reported, is reprinted in the Appendix to this petition at pages 19-29.

JURISDICTION

The judgment of the Court of Appeals is dated, and was entered on, January 12, 1987. The jurisdiction of this Court is invoked under 28 U.S.C., section 1254(1). The petition has been filed within the time allowed by law.

RELEVANT CONSTITUTIONAL PROVISION AND STATUTE

United States Constitution:

**Tenth Amendment - Reserved
Powers to States -**

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.



Internal Revenue Code:

26 U.S.C. § 86. Social Security and tier 1 railroad retirement benefits

(a) In general.- Gross income for the taxable year of any taxpayer described in subsection (b) (notwithstanding section 207 of the Social Security Act) includes social security benefits in an amount equal to the lesser of -

(1) one-half of the social security benefits received during the taxable year, or

(2) one-half of the excess described in subsection (b)(1).

(b) Taxpayers to whom subsection (a) applies. -

(1) In general.- A taxpayer is described in this subsection if -

(A) the sum of -

(i) the modified adjusted gross income of the taxpayer for the taxable year, plus

(ii) one-half of the social security benefits received during the taxable year, exceeds

(B) the base amount.

(2) Modified adjusted gross income.- For purposes of this



subsection, the term "modified adjusted gross income" means adjusted gross income -

(A) determined without regard to this section and sections 221, 911, 931, and 933, and

(B) increased by the amount of interest received or accrued by the taxpayer during the taxable year which is exempt from tax.

(c) Base amount.- For purposes of this section, the term "base amount" means -

(1) except as otherwise provided in this subsection, \$25,000,

(2) \$32,000, in the case of a joint return, and

(3) zero, in the case of a taxpayer who -

(A) is married at the close of the taxable year (within the meaning of section 143) but does not file a joint return for such year, and

(B) does not live apart from his spouse at all times during the taxable year.



STATEMENT OF THE CASE

Invoking the jurisdiction of the District Court under 28 U.S.C., section 1331, petitioners commenced this action in October 1985 challenging the constitutionality of that portion of section 86 of the Internal Revenue Code which requires that otherwise tax-exempt interest earned on municipal securities is to be treated as income for the purpose of calculating whether an individual's social security benefits are subject to federal income tax (26 U.S.C. §§ 86 [a], [b], [c]). Petitioners asserted that by mandating the inclusion of such interest income, section 86 contravenes the constitutional doctrine of intergovernmental tax immunity and the guarantee of the City's sovereignty under the Tenth Amendment to the United States Constitution because it effectively imposes a tax on the interest earned by many social security recipients on



municipal securities and consequently impairs the City's ability to borrow money in order to fund essential services and capital projects (CA2, CA5-CA10, CA12-CA14).¹

In support of their subsequent motion for summary judgment (CA25), petitioners, based upon affidavits from Comptroller Goldin and Richard C. Bain, Jr., Managing Director in the public finance investment banking division of Shearson-Lehman Brothers, Inc., demonstrated that section 86 has decreased the market for, and will thereby force the City to increase the interest rates that it will have to pay on, its securities in order to attract purchasers (CA29-CA32, CA34-CA35). Comptroller

¹Unless otherwise indicated, numbers in parentheses preceded by the letters "CA" refer to pages of the Appendix in the Court of Appeals. Numbers preceded by the letter "A" refer to pages of the Appendix to this petition.



Goldin's affidavit also showed how this detrimental effect of section 86 on the City's power to borrow money could impair its ability to serve the needs of its citizens (CA28-CA29).

In or about the same time as plaintiffs moved for summary judgment, respondent James Baker, in his capacity as the Secretary of the United States Treasury, moved for an order dismissing the complaint for lack of standing and for failure to state a claim upon which relief could be granted (CA37-CA38).

Following oral argument on the motions (CA40-CA66), the District Court issued its decision from the bench (A19-A29). After first ruling that petitioners had standing to bring this action (A20-A24), the District Court concluded that section 86 does not implicate the constitutional tax immunity doctrine because the statute is a tax, not on



interest earned on municipal securities, but, rather, only on social security income (A24-A25, A27-A28; see, A22). The District Court also believed that, in any event, the immunity doctrine had been greatly "narrow[ed]" in view of the fact that the federal government can tax the transfer by gift or testamentary devise, and capital gains on the sale, of municipal securities, as well as the salaries of State and municipal employees and a State's commercial business enterprises (A25-A27). The District Court acknowledged, however, that this Court has never overruled its holding in Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429, opinion on rehearing, 158 U.S. 601 (1895) that the federal taxation of the interest earned on municipal securities is constitutionally prohibited (A26; see, CA56). Although also conceding that the burden placed upon the City by section 86 could be



"substantial", the District Court held that such an adverse impact was "constitutionally permissible" because it was "scarcely more" than the burden which results from the federal taxation of City employees' salaries (A28-A29).

The District Court did not, however, explicitly address petitioners' Tenth Amendment claim.

In its January 12, 1987 opinion (A1-A17), the Court of Appeals agreed with the District Court's conclusion that section 86 does not violate the immunity doctrine because it taxes only social security income rather than interest earned on municipal securities (A10-A13).² The Court of

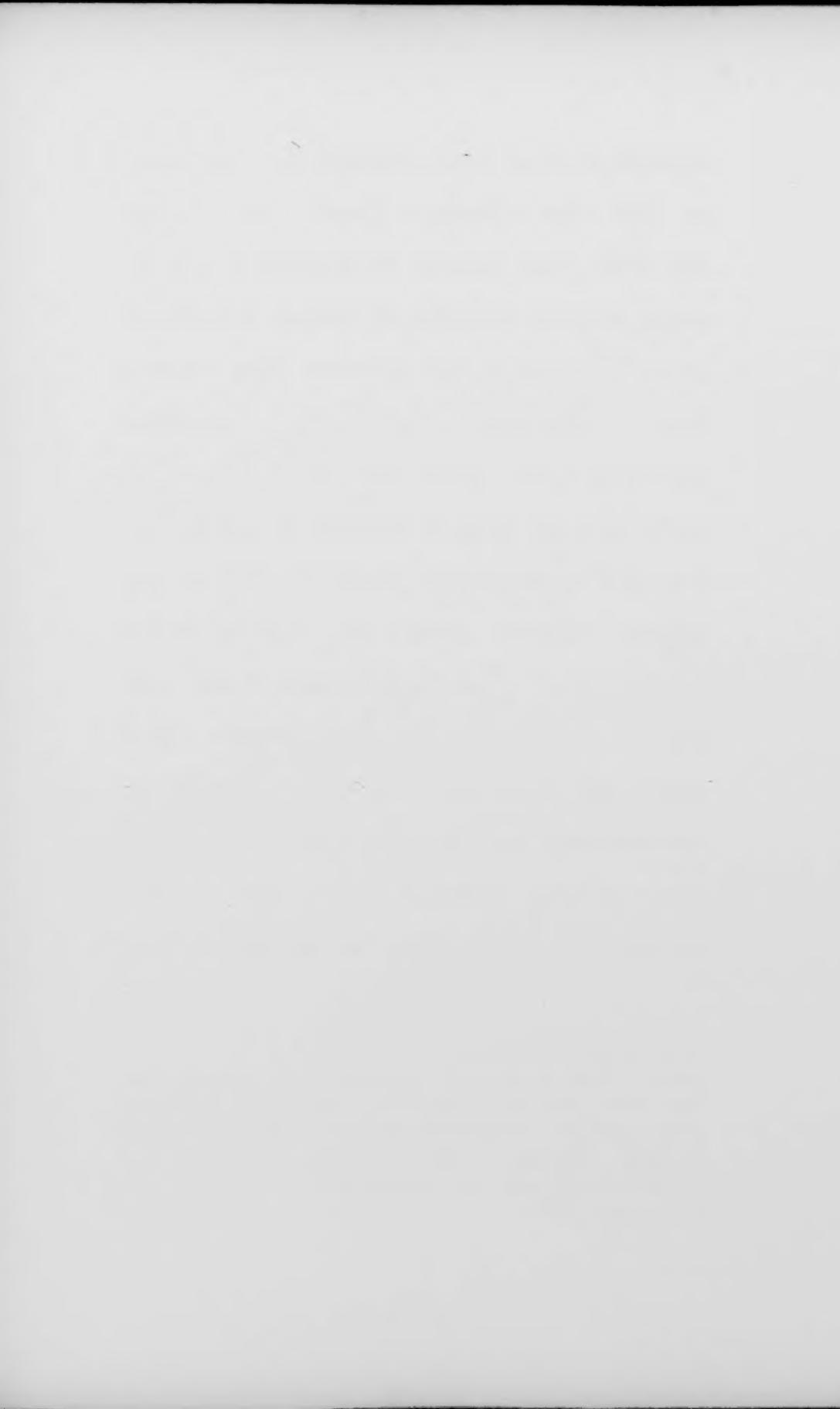
²On the appeal, respondent did not challenge, as he did in the District Court, petitioners' standing to bring this action, which the Court of Appeals implicitly affirmed by addressing the merits of the (Footnote Continued)



Appeals so held even though it recognized, as did the District Court (A20, A25, A28-A29), that section 86 imposes a tax on social security benefits of certain individuals solely because of the interest they receive from otherwise tax-exempt municipal securities (A8, A10), and that section 86 could thereby cause a decrease in the market for, and consequently force the City to pay higher interest rates on, its securities (A8-A9, A13). Pointing to many of the same federal taxes cited by the District Court which this Court has held do not contravene the immunity doctrine, the Court of Appeals, nevertheless, believed that the burden imposed upon the City by section 86 was

(Footnote Continued)

case. The Court of Appeals also raised, but did not decide, whether the constitutional proscription established by this Court in Pollock against the federal taxation of interest earned on municipal securities, is still good law.



"indirect" and, therefore, not unconstitutional (A14-A16). The Court also ruled that petitioners' Tenth Amendment claim was "totally unsupportable" because it was based upon a "drastic view" as to how section 86 will impair the City, and because the power to tax personal income has been expressly delegated to Congress (A16-A17).

REASONS FOR GRANTING THE WRIT

The Court of Appeals' determination that section 86 is not unconstitutional even though it could impair the City's borrowing power, is without precedent and is in conflict with this Court's decisions in Pollock v. Farmers' Loan & Trust Co., supra, 157 U.S. 429, Willcuts v. Bunn, 282 U.S. 216 (1931), and Massachusetts v. United States, 435 U.S. 444 (1978), which delineate the parameters as to when federal legislation is a constitutionally-prohibited tax under the well-established constitutional doctrine of



intergovernmental tax immunity. Indeed, the Court of Appeals' ruling constitutes, in effect, a repudiation of the immunity doctrine, which is an implied limitation on the taxing power of the Federal and State governments. Under that doctrine, both the Federal and State governments, and their political subdivisions and instrumentalities, enjoy a reciprocal immunity from taxation by each other. Metcalf & Eddy v. Mitchell, 269 U.S. 514, 521-24 (1926). The Court of Appeals' determination also undermines the Tenth Amendment based upon an interpretation of the Federal taxing power under Article I, section 8, clause 1, of, and the Sixteenth Amendment to, the United States Constitution which is contrary to this Court's decisions in Pollock, Eisner v. Macomber, 252 U.S. 189 (1920), and other cases. The Court of Appeals' holding is also inconsistent, in principal, with this Court's



reasoning in Fry v. United States, 421 U.S. 542 (1975) as to the intended purpose of the Tenth Amendment.

The issues raised in this action, which are also now before this Court in South Carolina v. Regan in a challenge to the constitutionality of section 310(b)(1) of the Tax Equity and Fiscal Responsibility Act of 1982 (26 U.S.C. § 103[j]), are of great public importance. The Court of Appeals has created a precedent which, if followed, will subject virtually every State, County and municipality in this country to extraordinary financial hardship because it gives judicial sanction to federal legislation which impairs those entities' ability to raise revenue to fund essential services and capital projects to serve the needs and interests of their citizens.



(1)

In Pollock v. Farmers' Loan & Trust Co., supra, 157 U.S. at 583-86, this Court explicitly ruled that, by virtue of the immunity doctrine and irrespective of Congress' power to lay and collect taxes under Article 1, section 8, clause 1, of the Constitution, the Federal government is prohibited from enacting a statute which either taxes the interest earned on a municipality's securities or which directly infringes on a municipality's borrowing power. Section 86 unconstitutionally does both.

Section 86 effectively taxes interest earned on municipal securities because, as both the District Court and the Court of Appeals properly found (A8, A10, A20, A25, A28), it imposes a tax on social security income of certain individuals solely by virtue of the interest they receive on otherwise

tax-exempt municipal securities. Section 86 mandates that such interest is to be treated as income for the purpose of calculating whether an individual's social security benefits are subject to federal income tax. If a person's "modified adjusted gross income" (which is defined by section 86 to include interest on municipal securities), plus one-half of his or her social security benefits, exceeds a "base amount" of \$25,000 for individual taxpayers and \$32,000 for taxpayers filing a joint return, then the taxpayer must include as gross income the lesser of one-half of the excess or one-half of the social security benefits received. 26 U.S.C. §§ 86(a), (b), (c).

Thus, an individual taxpayer with \$16,000 in non-exempt taxable income, \$5,000 in tax-exempt interest income from municipal securities, and \$10,000 in social security benefits, will have a "modified adjusted

gross income" of \$26,000, or \$1,000 more than the "base amount". Since one-half of this excess of the "base amount" (\$500) is less than one-half of the social security benefits received, the taxpayer would be required to include \$500 as gross income for purposes of computing his or her taxable income. This result arises only because of the mandated inclusion in the foregoing section 86 calculation of the interest received from tax-exempt municipal securities.

Accordingly, by characterizing section 86 as a tax only on social security income, the Court of Appeals' decision ignores reality and exalts form over substance. Regardless of how the tax is labeled or the source of its payment, many social security recipients who receive interest from municipal securities have less disposable income because that interest is included in the section 86 calculation. Moreover, since,

as petitioners demonstrated (CA29-CA32, CA34-CA35) and as the Court of Appeals acknowledged (A8-A9, A13), section 86 will compel the City to pay higher interest rates on its securities in order to attract purchasers to what is perceived as a less attractive investment, the statute effectively shifts the tax to the City.

To the extent that the Court of Appeals believed that the passage of the Sixteenth Amendment, and decisions by this Court, subsequent to Pollock have "cast doubt" on the continued vitality of Pollock insofar as it prohibits the federal taxation of municipal securities income (A9-A10), the Court was mistaken. This Court has repeatedly held that the sole purpose of the Sixteenth Amendment was to eliminate the requirement of Article I, section 2, clause 3, of the United States Constitution for an apportionment among the States of taxes



imposed on income; and that the Amendment did not extend the powers of Congress to tax any new subject matter, much less interest earned on municipal securities. See, e.g., Eisner v. Macomber, supra, 252 U.S. at 205-06, and the other cases cited therein.

Nor has this Court ever overruled, or questioned the propriety of, Pollock. Indeed, in those cases cited by the Court of Appeals where this Court either has declined to extend the tax immunity doctrine to the transfer upon death, and the capital gains made on the sale, of municipal securities, or to the income of State independent contractors, or where this Court has cut back the doctrine's application to the previously-accepted area of State employees' salaries (A12-A15), this Court has been very careful to distinguish and reaffirm Pollock. Helvering v. Gerhardt, 304 U.S. 405, 417



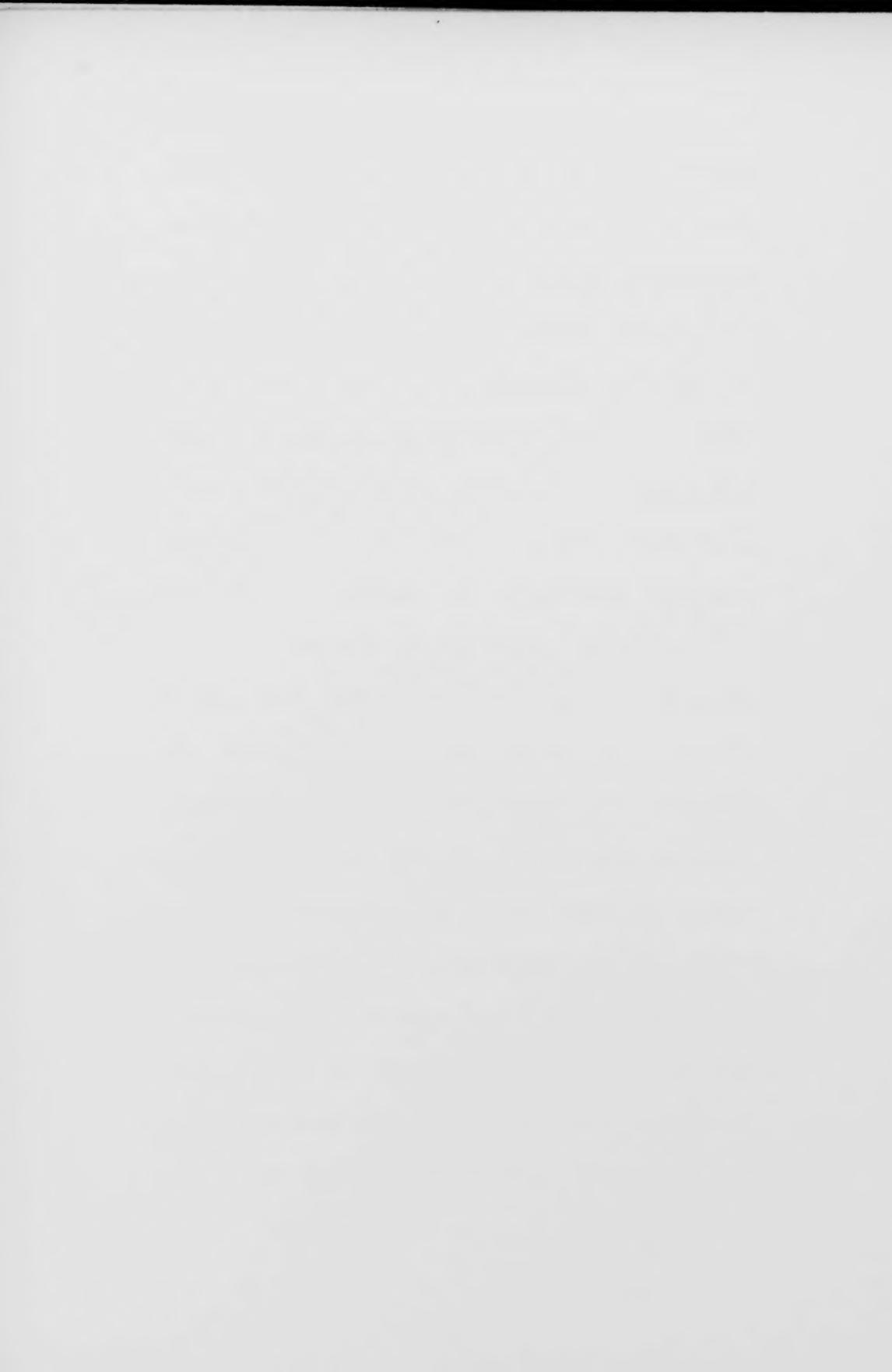
(1938); Willcuts v. Bunn, supra, 282 U.S. at 225-27; Metcalf & Eddy v. Mitchell, supra, 269 U.S. at 521-22; Greiner v. Lewellyn, 258 U.S. 384, 387 (1922).

The Court of Appeals' determination is also contrary to this Court's decision in National Life Ins. Co. v. United States, 277 U.S. 508 (1928). In that case, this Court invalidated a provision of a Federal income tax law which permitted insurance companies to exclude municipal bond interest from their gross income, but reduced the reserve deduction otherwise available to such companies by the full amount of the exempt interest which was excluded from gross income. In so ruling, this Court noted (277 U.S. at 518-19) that, under the statute before it, an insurance company with tax-exempt income paid as much tax as if its total income had been derived entirely from taxable sources. Thus, the effect of the



statute was to impose, as section 86 does here, a tax on income derived from otherwise tax-exempt municipal securities.

In its opinion, the Court of Appeals disregarded National Life and mistakenly relied, instead, upon United States v. Atlas Life Ins. Co., 381 U.S. 233 (1965) (A11-A12), where the plaintiff insurance company challenged a Federal tax statute which did not allow it to obtain a double deduction of a portion of its tax-exempt income. In that case, this Court, in rejecting the company's claim, distinguished National Life on the ground that, under the statute at issue there, an insurance company would pay the same amount of tax regardless of whether it had tax-exempt income, whereas under the statute in Atlas, an insurance company with such income would pay less tax, not more as the Court of



Appeals believed here (A11). 381 U.S. at 243-44.

In any event, even if section 86 is not, in effect, a tax on otherwise tax-exempt interest earned on municipal securities, which it is, the Court of Appeals' holding is, nevertheless, still inconsistent with Pollock because section 86 directly impairs the City's exercise of its borrowing power. As petitioners demonstrated (CA29-CA32, CA34-CA35), section 86 has caused a decrease in the market for, and will force the City to pay higher interest rates on, its securities. Indeed, the Court of Appeals conceded that section 86 could impose such a burden (A8-A9, A13), which the District Court characterized as possibly "substantial" (A28). Thus, such a burden is anything but "indirect", as the Court of Appeals opined (A16).

Indeed, applying the test enunciated by this Court in Willcuts v. Bunn, supra, 282 U.S. at 228-29, section 86 is invalid because the sale by the City of its securities, with which the statute interferes, is "inseparably connected" with the City's action in borrowing money. Different from the effect of section 86 is the constitutionally-permissible federal taxation of the subsequent private sale or transfer upon death of municipal securities, cited by the Court of Appeals (A14-A15). Those transactions occur after the securities have been issued by, and are not made directly or indirectly on behalf of, the City. Accordingly, they are in no way inextricably tied with the City's exercise of its borrowing power. See Willcuts v. Bunn, supra, 282 U.S. at 227-30. The constitutionally-permissible federal taxation on the income of State employees and independent contractors,

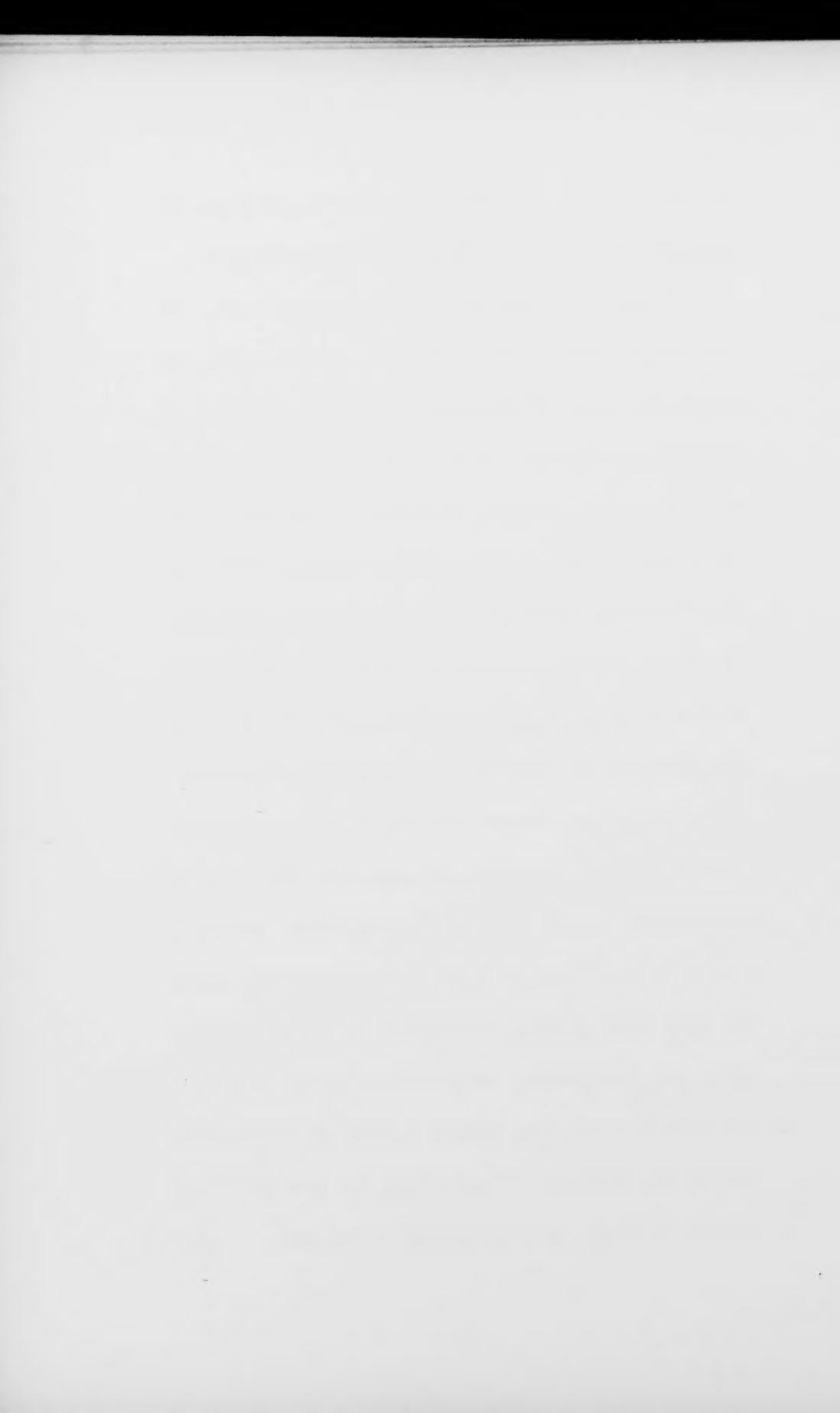


also relied upon by the Court of Appeals (A15), is not even remotely connected with the City's borrowing power.

The Court of Appeals' refusal to invoke the tax immunity doctrine so as to invalidate section 86, is also at odds with this Court's most recent statement as to when the doctrine renders federal legislation unconstitutional. In Massachusetts v. United States, 435 U.S. 444, 459-60 (1978), this Court held that the immunity doctrine prohibits the enactment of a federal statute whose subject is not a "natural and traditional source of federal revenue", and whose effect can conceivably "operate to preclude traditional state activities". Section 86 is unconstitutional under that two-prong test. Whether the statute is viewed as a tax imposed solely on social security benefits, or, in addition, on interest earned on municipal securities, such income has never

before, except in the invalidated statute in Pollock, been the subject of a federal tax.

Moreover, section 86 operates, or, at the very least, can conceivably operate, to preclude the traditional City activities of raising revenue and financing essential services and capital projects. Indeed, the resulting harm is self-evident and is significantly greater than a mere economic burden, which, without more, this Court stated in Massachusetts (435 U.S. at 461), is insufficient to invoke the immunity doctrine. Since, as the Court of Appeals recognized (A8-A9, A13), section 86 impairs the City's borrowing power in the securities market, the City's ability to fund basic services such as fire and police protection and sanitation may be adversely affected (CA29, CA32). Maintenance of the City's infrastructure also could be deferred, resulting in bridges and roads falling into disrepair (CA29). The



City's short-term credit might erode, making it hard to raise City employees' wages and requiring a reduction in the number of City personnel, thereby destroying employee morale and rendering it difficult to recruit replacements (Id.). Thus, without adequate financing as a result of section 86, the City conceivably could be unable to function effectively.

In sum, the Court of Appeals' ruling that section 86 is not a tax which contravenes the immunity doctrine, is inconsistent with this Court's decisions in Pollock, Willcuts, and Massachusetts.

(2)

The Court of Appeals' refusal to hold that section 86 also contravenes the Tenth Amendment to the United States Constitution, is similarly at odds with this Court's decisions as to the scope of the Federal taxing power, and renders the Amendment



meaningless. The Tenth Amendment provides that the "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Section 86 is not predicated upon a power "delegated" to the Federal government. Contrary to the Court of Appeals' belief (A9-A10, A16-A17), this Court's decisions in Pollock and Eisner, discussed supra, indicate that Congress' power under Article I, section 8, clause 1, of, and the Sixteenth Amendment to, the Constitution to "lay and collect" taxes, does not include the power to impose what here is, in effect, a tax on interest earned on municipal securities.

Moreover, the Court of Appeals' ruling is equally inconsistent, in principle, with this Court's reasoning in Fry v. United States, supra, 421 U.S. at 547 n.7, where this Court stated that the Tenth Amendment



is intended to prevent the impairment of the States' "integrity or ability to function effectively in a federal system." Although acknowledging the adverse impact that section 86 could have on the City (A8-A9, A13), the Court of Appeals mistakenly attributed no legal significance to that burden. It is axiomatic that the power to raise revenue and to spend those funds to serve the needs and interests of its citizens, is central to the concept of the sovereignty of the States and their political subdivisions. Petitioners demonstrated, however, that section 86 abridges or otherwise threatens the City's ability to function in this regard.

(3)

The import of the Court of Appeals' decision upholding the constitutionality of section 86 goes well beyond its adverse impact upon the City. All states, counties and municipalities which raise revenue, as



virtually all do, through the issuance of securities, will be irreparably harmed if the precedent established by the Court of Appeals is allowed to stand. The market for those securities will decrease, as they already have with respect to the City's bonds and notes. As a result, governmental entities will have to pay higher interest rates on their securities in order to attract purchasers, which, in turn, will ultimately cause a shrinkage in the funds available for basic services and capital projects.

Given such potentially disastrous results, we submit that a Writ of Certiorari should issue to review the Court of Appeals' judgment. This is particularly warranted in view of the fact that this Court, in South Carolina v. Regan, is already presently considering the scope of the immunity doctrine and the Tenth Amendment, as they relate to the federal taxing power, in a



challenge to the constitutionality of section 310(b)(1) of the Tax Equity and Fiscal Responsibility Act of 1982 (26 U.S.C. § 103[j]).³ Significantly, Justice O'Connor of this Court, citing Pollock in her opinion concurring in this Court's assumption of original jurisdiction in that case, which opinion was joined in by Justices Rehnquist and Powell, observed that South Carolina's intergovernmental tax immunity claim against section 310(b)(1) has a "significant historical basis". 465 U.S. 367, 401 (1984). Since the issues raised here with respect to section 86 are analogous to, and are at least of equally compelling public importance as

³Section 103(j) requires that publicly-issued securities of a State or local government with maturities of greater than one year must be issued in registered, rather than bearer, form in order for the interest earned on such securities to be exempt from federal income taxation.



those asserted in South Carolina v. Regan, this petition should be granted.⁴ The Special Master appointed by this Court to develop a record in South Carolina v. Regan (465 U.S. at 382) filed his report on January 23, 1987. If this petition is

⁴This is especially true in view of the recurring litigation challenging the constitutionality of section 86. At least three other federal actions have been brought, thus far, contesting the statute's legality: one by the County Executive of Essex County, New Jersey (Shapiro v. Baker, No. 84-2492 [D.N.J.]); and two by individual taxpayers. Schechter v. United States Treasury Department, No. CV-85-3306 (E.D.N.Y.); Boli v. United States, No. 151-86 T (Ct. Cl. D.C.). The complaints in Shapiro and Boli have been dismissed on the merits by the District Court and the Court of Claims, respectively. However, the Court of Claims' judgment in Boli is now on appeal to the United States Court of Appeals for the Federal Circuit. We have been informed by counsel for the plaintiff in Schechter that the complaint in that action was dismissed on procedural grounds; that the District Court's judgment will be amended to reflect that the dismissal was without prejudice; and that the plaintiff will file a new complaint in that action.



granted, we respectfully request that this
case be heard with South Carolina.

CONCLUSION

THE PETITION FOR A WRIT OF
CERTIORARI SHOULD BE
GRANTED.

Respectfully submitted,

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